80-2192

Office-Supreme Court, U.S.
FILED
JUN 24 1981
ALEXANDER L. STEVAS
CLERK

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MARY JOSEPHINE WOOD,

Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI

ANTHONY L. ANDERSON
Attorney for Petitioner
222 South Meramec, Suite 300
Clayton, Missouri 63105
Telephone (314) 726-2552

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1980

MARY JOSEPHINE WOOD,

Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY.

PETITION FOR WRIT OF CERTIORARI

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

QUESTIONS PRESENTED FOR REVIEW

(1) Whether, by affirming the trial court, which held that Respondent had not discriminated against Petitioner in

violation of Title VII of the Civil Rights Act of 1964 by paying her less than Respondent paid male deskmen of the same overall seniority who had worked exclusively in craft positions, the United States Court of Appeals for the Eighth Circuit so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

(2) Whether, by affirming the trial court, which overruled Petitioner's motion for the exclusion of witnesses on the second day of trial prior to hearing the first testimony of Respondent's non-management witnesses, the United States Court of Appeals for the Eighth Circuit so far sanctioned such departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

(3) Whether, by affirming the trial court, which held that Respondent had not discriminated against Petitioner in violation of Title VII of the Civil Rights Act of 1964 during her application for, training in and demotion from the position of deskman, nor had harassed her after the filing of a complaint with the Equal Employment Opportunity Commission, the United States Court of Appeals for the Eighth Circuit so far sanctioned such departure from the accepted and usual course of judicial proceedings, and the clear exceptions found in case law from other circuits to Rule 52(a) of the Federal Rules of Civil Procedure as to call for an exercise of this Court's power of supervision.

TABLE OF CONTENTS

	Page
Questions Presented for Review	1
Opinions Below	8
Jurisdictional Statement	8
Statutes and Regulations Involved	9
Statement of the Case	10
Point I - The United States Court of Appeals for the Eighth Circuit by affirming the trial court, which held that Respondent had not discriminated against Petitioner in violation of Title VII of the Civil Rights Act of 1964 by paying her less than Respondent paid male deskmen of the same overall seniority who had worked exclusively in craft positions, so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.	32
Point II - The United States Court of Appeals for the Eighth Circuit by affirming the trial court, which overruled Petitioner's motion for the exclusion of witnesses on the	38

Page

second day of trial prior to hearing the first testimony of Respondent's non-management employees called as Petitioner's witnesses, so far sanctioned such departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Point III - The United States Court of Appeals for the Eighth Circuit by affirming the trial court, which held that Respondent had not discriminated against Petitioner in violation of Title VII of the Civil Rights Act of 1964 during her application for, training in and demotion from the position of deskman, nor had harassed her after the filing of a complaint with the Equal Employment Opportunity Commission, so far sanctioned such departure from the accepted and usual course of judicial proceedings, and the clear exceptions found in case law from other circuits to Rule 52(a) of the Federal Rules of Civil Procedure, as to call for an exercise of this Court's power of supervision. 42

Conclusion

TABLE OF AUTHORITIES

Page

Acha v. Beame, 570 F.2d 57, 64 (2d Cir. 1978). 32

Evans v. United Air Lines, Inc., 431 U.S. 553, 52 L.Ed.2d 571, 97 S.Ct. 1885 (1977) 47

Farr v. Lineberger, 207 S.W.2d 455 (Mo. 1948) 40

Griggs v. Duke Power Co., 401 U.S. 424, 282 L.Ed.2d 158, 98 S.Ct. 849 (1971) . . . 34

McDonnell Douglas v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973) 44

Meffert v. Lawson, 223 S.W.31 Mo. 1921). 40

Parsons v. Kaiser Aluminum and Chemical Corp., 575 F.2d 1374 (5th Cir. 1978). 44

Personnel Administrator of Massachusetts v. Feeny, 442 U.S. 256, 60 L.Ed.2d 870, 99 S.Ct. 2282. 34

Sears v. Atchison Topeka and San Francisco Rail Road, 454 F.Supp. 158 (D.C. Kan. 1978) . 33

Page

Teamsters v. United States, 431 U.S. 324, 52 L.Ed.2d 396, 97 S.Ct. 1843 (1977). . . 34

Texas Dept of Community Affairs v. Burdine, 450 U.S. _____, 67 L.Ed.2d 207, 101 S.Ct. 1089, 79 U.S.L.W. 4214 (March 1981) . . 48

United States v. N.L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973) . . . 33

United States v. St. Louis San Francisco Railway Co., 464 F.2d 301 (8th Cir. 1972), cert. denied, 409 U.S. 1116 (1973) 33

United States v. Warren, 585 F.2d 219 (5th Cir. 1977), rehearing denied, 558 F.2d 605 (5th Cir.), cert. denied 434 U.S. 1017 (1978). 42

Weeks v. Housing Authority of Los Angeles County, No. CZ 79-03868 (D.C. Cal. 1981). 46

Federal Rule of Civil Procedure 52(a) 43

Federal Rule of Evidence 615 38

52 U.S.C. § 2000e et seq. 32

THE OPINIONS BELOW

The last opinion below is reported as Wood v. Southwestern Bell Telephone Company, 637 F.2d 1188 (8th Cir. 1981). The trial court's memorandum opinion in No. 75-580(C 1) (E.D. Mo. 1977) is unpublished. Said opinions are reproduced herein as Appendices A and B respectively. Originally the trial court had granted summary judgment for Respondent at 442 F.Supp. 41 (E.D. Mo. 1977) and Petitioner's original appeal herefrom is reported at 580 F.2d 339 (8th Cir. 1978). EEOC's determination of probable cause is reproduced as Appendix C.

JURISDICTIONAL STATEMENT

The judgment sought to be reviewed was entered January 19, 1981, by the United States Court of Appeals for the Eighth Circuit. On February 24, 1981, the Court denied Petitioner's motion for

rehearing or rehearing en banc. On May 19, 1981, Justice Blackmun granted an extension of time to file a petition for writ of certiorari up to and including June 24, 1981. The statutory provision believed to confer jurisdiction upon this court to review the judgment in question is 28 U.S.C. 2101(c).

STATUTES AND REGULATIONS INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000(e) et seq.

Federal Rule of Civil Procedure 52(a)

Federal Rule of Evidence 615

Pertinent text of all of the foregoing is set forth in Appendix "D" infra.

STATEMENT OF THE CASE

When Mary Josephine Wood, Petitioner, was given the "craft" position of deskman at Respondent Southwestern Bell Telephone Company's midtown central office on December 1, 1968, she became the second woman in the history of Southwestern Bell to receive a craft position in the St. Louis area and the first woman to receive a "craft" position in the midtown central office. On November 7, 1969, she was removed from her "craft" position at the test board for allegedly poor performance, though she remains an employee of the company to this day. Miss Wood contends that her removal from the position of deskman was the result of discriminatory training and a pattern of harassment. She further contends that she suffered reprisals after filing her

discrimination charge with the Equal Employment Opportunity Commission (EEOC).

Jobs in Respondent's plant department, of which the midtown central office is a part, are divided into craft and non-craft (clerical) positions, the craft positions being the higher paying of the two. Traditionally, craft positions were "men's jobs" and non-craft positions were "women's jobs."

At that time, the craft position of deskman required operation of testing equipment to test customer's lines and telephone cables. A deskman was responsible for analyzing trouble reports, dispatching repair forces, and cooperating in locating and clearing communication problems between Respondent's central office and the customer's premises.

On October 21, 1968, Miss Wood applied for the position. The deskmen at the midtown central office, all men,

threatened a petition drive to keep Miss Wood from becoming the first woman deskman on their test board (79 Tr. 30, 79 Tr. 183). Her first application for the position was refused, and she was made to write a letter of application formally stating her qualifications and educational background. The Test Center Foreman, Mr. McGrath, then attempted to dissuade her from applying; he later agreed to consider her for the job only if she would get her hair cut (76 Tr. 23, 79 Tr. 176). Prior to being formally considered for the position, she was required to take and pass a "craft" test.

If Miss Wood had been a male applicant, she would have been given the "craft" test when originally hired by the telephone company (76 Tr. 25-6, 79 Tr. 69, 85), not 18 years later. Further, she would have been able to take advantage of a formalized bid procedure open

to craft, therefore male, employees to obtain any newly open deskman's job rather than write a formal letter of application to the company.

The evidence indicates that Miss Wood was paid four dollars a week more as a deskman that she was paid as a repair clerk, but substantially less than men with the same overall seniority who had worked exclusively in craft positions (76 Tr. 113; 79 Tr. 8).

When Miss Wood assumed the position of deskman, she began a training program which, although extensive, was purposely dissimilar to that given to men.

One of her trainers, Mr. Fifield, was a co-worker, a violation of the general understanding between Respondent and the union that only supervisory personnel would impart training. In addition, Mr. Fifield had been associated with the petition to keep Miss Wood off of the

test board because of her sex.

During her training and subsequent time as a deskman, when Miss Wood would ask her supervisors for clarification of testing procedures, she was given conflicting answers to her questions and told to use conflicting testing techniques. She was not permitted to use the procedures that others, i.e., the men, on the testboard used, and when she did use those methods, she was reprimanded while the others were not (Plaintiff's Ex. 19, p.17).

Management considered it helpful for each new deskman to go out into the field with a repairman to see how problems were handled on the customer's premises. In fact, major considerations in determining qualifications for deskman's job were experience as a cable splicer, installer, repairman or switchman, all of which were

entirely male positions when Miss Wood came to the test board (79 Tr. 38-39). Yet, when Miss Wood requested an opportunity to obtain training in the field, her request was denied (79 Tr. 274, 79 Tr. 136, 79 Tr.38-9). Later, she was criticized by Respondent for not fully appreciating the complexity of the work done in coordination with repairmen in the field and that was advanced as a reason for her removal.

Moreover, at the trial there were a number of other discrepancies in Respondent's "evidence," including Defendant's Exhibit D1, which shows one whole day (8 hours) of training for Miss Wood in the central office switchroom, but the report was signed by a second level management a full eleven months after having been written. Miss Wood testified that her actual switchroom training consisted

of a tour which lasted 15 minutes (79 Tr. 424).

On August 18, 1969, Miss Wood was sent to "AC/DC" school for a course in basic electricity. She was told that if she failed the course, she would be removed from the test board. However, men who failed AC/DC school were allowed to remain on the test board as deskmen. Miss Wood graduated on August 30, 1969, with a grade of 83, the second highest in the class. (Plaintiff's Ex. 19, p.18-19).

John Schmogy, Miss Wood's immediate supervisor and the writer of several of Respondent's exhibits critical of Miss Wood's cable handling, appears to have deliberately prevented her from obtaining the necessary information about testing cable throws (Cf. Plaintiff's Ex. 20A and Defendant's Ex. D9). He prepared the document offered as Defendant's Ex. D8,

in which he vouched for having purportedly imparted cable information to her on the job. However, on the date specified in Mr. Schmogy's report, Miss Wood was not present at her job, but was attending AC/DC school instead. Respondent later charged that she had inadequate expertise on the cable throws.

Thus, during her entire period on the test board, Miss Wood was held to a different standard and had different working conditions that her male counterparts.

On May 7, 1969, Miss Wood was appraised and found to be "fair" in performance, "fair to good" in dependability and resourcefulness, and "fair" in learning and development (Plaintiff's Ex. 13E). She was advised, however, that her production would have to be improved (Plaintiff's Ex. 13I). Later, a company official admitted to an EEOC investigator that the company kept no production records so

there was no way Miss Wood's "production" could have been objectively verified. (79 Tr. 50, 58-9, Plaintiff's Ex. 14A).

On her second appraisal on October 3, 1969, Miss Wood was found "unsatisfactory." The conflicting instructions and discriminatory training had caused her to "make unnecessary tests which resulted in poor productivity" (79 Tr. 303); specifically, Respondent asserted, she placed "too many hickeys," "hickey" being a special electrical connection which allowed the deskman to determine whether the trouble on a line was inside or outside the central office. In placing hickeys, however, she was following the instructions given her by her trainer, Mr. Fifield, and management representatives repeatedly testified at trial that there was no other way to test a spare pair than with a hickey (79 Tr. 59; 79 Tr.

118; 79 Tr. 322; 79 Tr. 303).

When she was advised that she would be reassigned to another position, "more suitable to her capabilities" (Plaintiff's Ex. 13J), she appealed to the union, and it was agreed that she should be given four additional weeks on the test board. Miss Wood was finally removed from her deskman's position and reassigned as a repair clerk on November 9, 1969.

It is Respondent's contention that Miss Wood was an unsatisfactory employee in the position of deskman. On the other hand, witnesses Melvin Kline, Betty McAdams and Richard Stoops indicated that her work as "average" to "above average," and in some instances, "good." Mrs. McAdams said she found no fault with Miss Wood's work. (79 Tr. 185) Mr. Stoops' testimony directly conflicts with that of Mr. Schmogy. Mr. Stoops, a repairman assigned to cable work, testified

that she "did good, careful work for her amount of experience in handling the cable throws," and that "she usually did an adequate job" (79 Tr. 267).

Much credible testimony for Miss Wood came from Melvin Kline, the only witness for either side (other than the EEOC investigator) not employed by Respondent at the time the testimony was taken. Mr. Kline had retired from the telephone company after more than 27 years of service as "a frame man, line man, installer, assigner, test board, a tester . . ." Mr. Kline died prior to the trial, but his testimony is preserved by deposition as Plaintiff's Exhibit 19.

Mr. Kline favorably compared Miss Wood's work to the "careful and precise work of a male tester named Slotman who was allowed to work in this matter for over 20 years and to retire from the test board" (Plaintiff's Ex. 19, p. 10).

He further described her work as "average to above average" (Plaintiff's Ex. 19, p. 14).

In addition, Mr. Kline testified that "Jo Wood was being instructed by two test board supervisors at that time to do her work by the book and other testers were using shortcuts which was a common practice. . . . Well, they [male testers] were getting away with things that she couldn't get away with . . . . [she] was being held down to a form and they weren't . . . ." (Plaintiff's Ex. 19, p. 17). Based on his experience of having performed the deskman job, having observed it, and having been associated with it in various capacities for 25 years, Mr. Kline stated that he believed the company's appraisal to be incorrect and that Miss Wood was a good tester. When asked where she would fit in a percentile ranking, he placed her in the upper half

(Plaintiff's Ex. 19, p. 29-30).

Another charge leveled at Miss Wood by management as the basis for her removal was that she took notes on her duties. Yet Richard Moore, a male tester, kept a book on his duties, presumably with the knowledge of management, without consequence (79 Tr. 197). Mr. Fifield and Mr. McGrath, upon questioning by the Court, admitted that every deskman kept notes (79 Tr. 195; 79 Tr. 54).

Mr. Schmogy and Mr. Seper testified that male deskmen did not answer the 611 calls because they were the repair clerk's responsibility, but that the female deskman did have to answer such calls (79 Tr. 309; 79 Tr. 38-9).

Since no productivity records were kept, Miss Wood's alleged "slow production" would necessarily have to have been the result of observation rather than any detailed check of documents. Yet, Mr.

Schmogy testified, for instance, that he had "no idea" how often Miss Wood answered the test board phone for incoming calls (79 Tr. 310). Mr. Schmogy also testified that he knew another tester, Mr. Rooks, "would have a tendency to nod sometimes" but his productivity was never questioned (79 Tr. 371).

Miss Wood followed instructions given to her by management to remind each repairman calling in to "check the multiples" (79 Tr. 350), to remind each frameman to take a hickey cord with him when he went to put up a hickey (79 Tr. 350-351), and to always have a repairman use his own meter before calling in to the board for a line test (79 Tr. 49-50). She repeatedly testified that obedience to these instructions was not required of the male testers, but that she felt that she must carry out those instructions to the letter or face discipline,

reprimand or removal for not doing so. This situation also had the effect of making her unpopular with the repairmen and framemen.

Male testers frequently wrote "Test OK" or "Inspect" on a trouble ticket, presumably with management's knowledge, and closed out the case. Miss Wood was not permitted by management to handle her work in that way (76 Tr. 66-8). She had to put reading in milliamperes and was not allowed to use the word "Inspect" (79 Tr. 333).

When a deskman made a mistake, it was company practice to return the test to the deskman and to call his attention to it. Miss Wood denies ever having a test returned to her as unsatisfactory. In fact, she thought she was doing a good job and was under the impression that her probation was for "asking fellow employees questions and following up on

cross-talk reports," not for low productivity and improper testing as Respondent later contended (76 Tr. 62; 79 Tr. 47, 93).

While on the test board and after her removal, Miss Wood was the victim of co-worker and management harassment because she was a woman which continued during the EEOC investigation of her charge. The initial incidents of harassment were not limited to Miss Wood, but extended to at least one other woman who came to the test board briefly a short time thereafter. Miss Wood testified that another woman, Norman Jansen, had left the "on-the-job training program" for new deskmen in tears after being repeatedly harassed by Jack Wann, a management trainer (76 Tr. 79-82). This incident is corroborated in company documents (79 Tr. 148; Plaintiff's Ex. 17).

According to Mr. Fifield's testimony, there was some hazing and harassment of Miss Wood of which management was aware. Mr. Kline testified that Miss Wood was subjected to "a certain amount of harassment" and that he was "physically present a couple of times where there was harassment." He continued, "I think, among the men, there was more courtesy shown to each other than there was shown to Jo Wood (Plaintiff's Ex. 19, p. 3)." Mr. Kline further corroborated Miss Wood's testimony about verbal harassment she received from certain male cable splicers working in a manhole, which she reported to Harold Sefton, a company supervisor, who did nothing about it (76 Tr. 203; 79 Tr. 276; Plaintiff's Ex. 19, p. 7). Mr. Fifield admitted harassing language generally (79 Tr. 203). Mr. Schmogy accepted responsibility for any harassment at the

test center, (79 Tr. 350) as well as for intentionally issuing the harassment-provoking instructions to remind framemen and repairmen of their duties (79 Tr. 350-351).

From time to time, equipment assigned to Miss Wood was misplaced or damaged by others, and she was made to use different equipment than male deskmen. Mr. Fifield, her co-worker, stated that she had the use of a "dialing tool" available to her, but Miss Wood testified that she was not allowed to use such a device. Mr. Schmogy admitted pulling Miss Wood's hand away from her headset when she sought to hear better by holding it tightly to her ear (76 Tr.37) because, presumably, one of the men had taken her new company-issued headset and left her with an old one (76 Tr. 37). To make matters worse, someone then put a paperclip in her headset (Plaintiff's Ex. 19, p.3-4;

Plaintiff's Ex. 17, p.3). Mr. Schmogy had her remove her pen and pencil from the testboard (79 Tr. 319) and gave her no small amount of difficulty over the placement of her purse (Plaintiff's Ex. 3), despite the fact that management condoned men bringing sleeping bags to work (79 Tr. 472) and placing stuffed pheasants on the test board itself for all to see (Plaintiff's Ex.3).

Incidents of continuing harassment included management's delaying her attendance award in February, 1977, because she had taken 3-1/2 hours off when her mother was dying (79 Tr. 437). Then on the day of her mother's funeral, a management representative showed up 10 minutes before the service to tell her she would not be paid for that day (79 Tr. 438).

Other harassment included being

deliberately assigned a broken locker (79 Tr. 434), not being allowed to move her car into the company lot (79 Tr. 456), and being consistenly passed over for another deskman's job after her demotion (79 Tr. 257; Plaintiff's Ex. 5B). She was reprimanded for personal calls she never made (Plaintiff's Ex. 13C). When an important call was received for her at a supervisor's station, she was written up in a most unflattering manner for inclusion in her personal file (Plaintiff's Ex. 13D, 79 Tr. 432). Her twentieth service anniversary was observed with less than what company practice required (76 Tr. 117-119, 79 Tr. 233). Moreover, after her removal she found a Christmas card on her desk with the inscription "Making Your Christmas Ham", which she thought was a still further attempt to humiliate her as a woman (79 Tr. 431).

In 1971, a consent decree was entered against Southwestern Bell at 365 F.2d 1105, 506 F.2d 735, 419 F.Supp. 1022, 556 F.2d 167 for past discriminatory practices, but Miss Wood received no compensation under it.

In its Findings of Fact at the conclusion of 8 days of trial (2 days in 1976 and 6 days in 1979, hence the foregoing transcript references, 76 Tr.____ and 79 Tr._____)*, the trial court dwelled on such facts as Petitioner's having received her Bachelor of Science degree in part through Respondent's tuition plan and Petitioner's having been paid according to a collective bargaining agreement and overlook evidence of discrimination described above.

---

* The 1976 testimony was before The Hon. John Regan, United States District Judge.

Moreover, the trial court considered as a conclusion of law that since Petitioner was not summarily fired but continued to work for Respondent, no sexual discrimination existed.

POINT I

The United States Court of Appeals for the Eighth Circuit, by affirming the trial court which held that Respondent had not discriminated against Petitioner in violation of Title VII of the Civil Rights Act of 1964 by paying her less than Respondent paid male deskmen of the same overall seniority who had worked exclusively in craft positions, so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

The provisions of 42 U.S.C. §2000e-2(h) make a bonafide seniority system a valid defense to different standards of compensation, but a bonafide seniority system has been defined as one that is based on pertinent, objective criteria impartially applied to all employees. Acha v. Beame, 570 F.2d 57, 64 (2d

Cir. 1978); United States v. St. Louis-San Francisco Railway Company, 464 F.2d 301, 309 (8th Cir. 1972), cert. denied, 409 U.S. 1116 (1973). Seniority systems which are neutral on their face have been declared invalid if they perpetuate the effects of past discrimination. See, e.g., United States v. N. L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973); United States v. St. Louis-San Francisco Railway Co., supra; Sears v. Atchison Topeka & San Francisco RR, 454 F.Supp. 158 (D.C. Kan. 1978).

The seniority system at Southwestern Bell is structured so that seniority within a craft position, not overall seniority with the company, governs the rate of compensation. The Court of Appeals and District Court found that the seniority system was bonafide and that the disparity in pay between Petitioner and the male deskmen was due to her lack of seniority

as a deskman and not the result of sexual discrimination.

Petitioner contends, however, that the seniority system, even though applied equally to all employees, perpetuates the effects of past discrimination by Respondent in that it operates to 'freeze' the status quo of prior discriminatory employment practices of Respondent. Cf., Griggs v. Duke Power Co., 401 U.S. 424, 430, 28 L.Ed.2d 158, 98 S.Ct. 849 (1971); Teamsters v. United States, 431 U.S. 324, 52 L.Ed.2d 396, 97 S.Ct. 1843 (L973)

In Personnel Administrator of Massachusetts v. Feeny, 442 U.S. 256, 60 L.Ed. 2d 980, 99 S.Ct. 2286 (1979), a two-fold inquiry was used by this Court to determine the presence of sexual discrimination. The first question to be asked is whether the seniority system is covertly or overtly based on gender. The second

question is whether the adverse effects reflect invidious gender-based discrimination.

Petitioner agrees that the "craft/noncraft" classification of Respondent's seniority system is not overtly based on gender, but on a classification seemingly applied equally to men and women. Unfortunately, at this premature point, the lower courts ended their analysis rather than proceed to the second step of the inquiry of Feeny analysis.

It is a basic tenet of our law that a person intends the foreseeable consequences of his actions. Discrimination against women is a clearly forseeable consequence of a seniority system that benefits those in "craft" positions when women were systematically excluded from holding "craft" positions in the past. "It would thus be disingenuous to say that the adverse consequences of this

[seniority system] for women were unintended, in the sense that they were not volitional or in the sense that they were not forseeable." Id. at 278, 60 L.Ed. 2d at 887. "Certainly, when the adverse consequences of a [seniority system] upon an identifiable group are as inevitable as the gender-based consequences of a [seniority system], a strong inference that the adverse effects were desired can reasonably be drawn." Id. at 279 n.25, 60 L.Ed.2d at 888 n.25. Thus, every time a woman hired under the old gender-discrimination system of Southwestern Bell Telephone Company moves from a clerical "non-craft" position to "craft", the past acts of discrimination are reasserted and the woman suffers anew for her employer's previous bias.

In Feeny, this Court determined that, although the absolute preference for veterans in civil service jobs was dis-

criminatory, it was constitutional because the discriminatory impact was negated by the legitimate legislative goal of aiding veterans. In this instant case, however, no legitimate reason has been presented, nor does one exist, to negate the inference of a discriminatory impact behind Respondent's system. Absent such a legitimate purpose, the seniority system invidiously discriminates against women and illegally perpetuates the discrimination practiced by Southwestern Bell Telephone Company in the past and should be held invalid. It would be improper to think that in drafting 42 U.S.C. § 2000(e) et seq., Congress intended to write off the seniority benefits accruing to the entire generation of women in the labor force before the Act's passage.

Accordingly, Petitioner believes that the lower courts erred in holding that the disparity in pay Petitioner experienced,

i.e., $114.00 per week versus $176.00 per week for a deskman with the same overall seniority, was not the result of sexual discrimination. Therefore, certiorari should be granted.

POINT II

The United States Court of Appeals for the Eighth Circuit, by affirming the trial court, which overruled Petitioner's motion for the exclusion of witnesses on the second day of trial prior to hearing the first testimony of Respondent's non-management employees called as Petitioner's witnesses, so far sanctioned such departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Rule 615 of the Federal Rules of Evidence makes the exclusion of witnesses from the courtroom a right effective upon the demand of either party. No time is

specified for the request to exclude witnesses.

In the 1979 trial before The Hon. H. Kenneth Wangelin, District Judge, Petitioner's counsel did not ask for the exclusion of any of the witnesses he called on the first day of trial because all were Respondent's management employees, then working for the telephone company in capacities hostile to Petitioner. On the second day of trial, however, Petitioner was to call non-management employees and requested the exclusion because the management employees who had testified the previous day remained in the courtroom. Petitioner's counsel thereby wanted the trial court to protect non-management witnesses from any reprisals and harassment, or fears of the same, resulting from their testimony in front of those same management employees. The Court denied Petitioner's request as untimely

(79 Tr. 134).

Significantly, only two witnesses, Melvin Kline, a retired phone company employee with 27 years of commendable service to his credit, and the EEOC investigator, were not active employees of Southwestern Bell at the time their testimony was given. Their statements sufficiently conflict with the testimony of interested witnesses, i.e., current employees of Respondent, to raise a question of credibility. Missouri law provides that [n]o person shall be disqualified as a witness. . .by reason of his interest in the event of the same as a party or otherwise, but <u>such interest may be shown for the purpose of his credibility</u>. . ." §491.010 RSMo. 1969. <u>See</u>, <u>Meffert</u> v. <u>Lawson</u>, 223 S.W.31 (Mo. 1921); <u>Farr</u> v. <u>Lineberger</u>, 207 S.W.2d 455 (Mo. 1948). [Emphasis added.]

Respondent, Southwestern Bell Telephone

Company, is a member of the Bell System, which has a virtual monopoly in the telephone industry. Skills learned from experience with the Bell System, therefore, have little or no application in the open job market. Bell employees know there is usually no other place for them to go if they testify to the dislike of the company, and they must live with the consequences of any testimony that might hurt the phone company.

Such a threat to an employee is very real. Management is quite concerned with "employee loyalty" to the company. For example, commenting upon Petitioner's appearance before a hearing conducted by the Missouri Public Service Commission (which followed but was not directly related to her demotion), Joseph Hatch, a management representative, told the EEOC investigator, "Hell, we should have fired her for disloyalty a long time ago [because] [s]he

testified before the rate committee." After the hearing, Miss Wood received at least one bad appraisal. (79 Tr. 141)

Accordingly, it was vitally important to the presentation of Petitioner's case that the witnesses be excluded so that the trial court might have the fullest accuracy of the witnesses' testimony. Besides being a denial of a legal right, the denial of the motion to exclude was in and of itself prejudicial to Petitioner. United States v. Warren, 558 F.2d 219 (5th Cir. 1977), rehearing denied, 558 F.2d 605 (5th Cir. 1977), cert. denied, 434 U.S. 1016 (1978). Therefore, because of such prejudice, the lower courts have sanctioned such departure from the accepted and usual course of judicial proceedings that the granting of certiorari is warranted.

POINT III

The United States Court of Appeals for

the Eighth Circuit, by affirming the trial court, which held that Respondent had not discriminated against Petitioner in violation of Title VII of the Civil Rights Act of 1964 during her application for, training in and demotion from the position of deskman, nor had harassed her after the filing of a complaint with the Equal Employment Opportunity Commission, so far sanctioned such departure from the accepted and usual course of judicial proceedings, and the clear exceptions found in case law from other circuits to Rule 52(a) of the Federal Rules of Civil Procedure, as to call for an exercise of this Court's power of supervision.

It has been held that a finding of non-discrimination is a finding of ultimate fact that can be reversed on appeal, even if not clearly erroneous under Rule 52(a). "We must be [wary] in discrimination suits where the elements

of fact and the law become particularly intermeshed, of the distinction between the findings of subsidiary fact and findings of ultimate fact. A finding of non-discrimination is a finding of ultimate fact that can be reversed free of the clearly erroneous rule." Parsons v. Kaiser Aluminum and Chemical Corp., 575 F.2d 1374, 1382-1383 (5th Cir. 1978)

Concerned with properly ordering the presentation of proof and allocating the burdens in Title VII cases, this Court, in McDonnell Douglas v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973), and subsequent cases, set forth a three-step procedure. First, the plaintiff carries the initial burden of proving a prima facie case of discrimination in order to create a rebuttable presumption of discrimination. Once this is accomplished, the burden shifts to the defendant to show a legitimate, non-discriminatory

reason for his decision, forcing him to articulate a specific reason and thereby frame a factual issue clearly. If the defendant meets this burden, the plaintiff must then prove, by a preponderance of evidence, that the articulated reason is a pretext for discrimination, thus keeping the ultimate burden of persuasion for the plaintiff.

This technical procedure, however, is only for the allocation of burden in a Title VII case, not for the determination of the legitimacy, or lack thereof, in a defendant's response to a plaintiff's prima facie presentation. Accordingly, there is not yet any "yardstick" from this Court for the proper judicial analysis which should go into a court's determination of "legitimacy".

This lack of case precedent has resulted in much being left to the individual courts' discretion in Title VII cases

so that each court has its own brand of analysis, with much room for individual social and political views to enter what should be impartial, consistent decisions. For example, in Weeks v. Housing Authority of the County of Los Angeles, No. CZ 79-03868- AAH (D.C. 1981), the Hon. Andrew Hauk, United States District Judge, stated, "A man wouldn't do these crazy things if he were an employee. But I suppose that's one of the prices we pay in this day of women's lib for hiring women in of these jobs. . . . They have their monthly problem, which upsets them emotionally and we all know that, at least any of us who have wives and daughters, and we know that you have got to . . . make allowances for it. . . ." But Judge Hauk went on to hold for the Plaintiff.

Insufficient guidelines exist for the

courts to maintain the consistency in judgments necessary in our common law system.

A specific test is required to analyze the facts set forth by the parties and to create greater consistency and uniformity of justice in Title VII cases. The "but for" test, as adopted by the dissent in United Airlines, Inc., v. Evans, 431 U.S. 533, 52 L.Ed.2d 571, 97 S.Ct. 1855 (1977)(Marshall, J., dissenting), is the appropriate inquiry. "But for her sex, respondent presently would enjoy all of the [seniority] rights that she seeks through this litigation." Id. at 560, 52 L.Ed.2d at 580. Petitioner submits that an inquiry into whether the Petitioner would have been treated in the manner complained of, but for the fact that she is a woman, is an appropriate test.

Workable analytical guidelines for both courts and employers generally would

be the result of this type of inquiry, yet such inquiry still fulfills the goals of the three-step method set out in McDonnell Douglas v. Green, supra. The plaintiff is still required to set forth a prima facie case and create a rebuttable presumption of discrimination. The defendant still has only the burden of production while the plaintiff retains the ultimate burden of proof. The "legitimacy" of the reason advanced by the defendant, however, would be measurable and definable.

Thus, the proper allocation of burdens, the major concern of McDonnell Douglas and the more recent Texas Dept. of Community Affairs v. Burdine, 450 U.S. _____, 67 L.Ed.2d 207, 101 S.Ct. 1089, 79 U.S.L.W. 4214 (March 1981), is met while a clearcut method of issue analysis is created.

In this instant case, it is obvious that Petitioner would not have been

treated the way she was but for the fact that she is a woman. The record clearly shows that Petitioner, as a female employee, was purposely treated differently than the male employees of Respondent and that she met the burden of presenting a prima facie case. Her supervisors and co-workers admitted generally harassing language and hazing, the different training she received, and the higher standard of performance to which she was held. These facts are documented by the evidence. Yet, Respondent never adequately controverted such evidence, nor did Respondent show that men received the same treatment. The EEOC investigator found gross "over supervision" as part of its probable cause finding of actionable discrimination. (See Appendix C, infra). Respondent failed to meet its burden of production, yet the lower courts ignored such evidence to

focus upon the fact that she was simply demoted and not fired as giving credility to Respondent's position that it possessed a "legitimate" reason for her removal from the test board. Respondent's "legitimate" reason seemed to vary from "too many hickeys", which would suggest she was doing a sizeable amount of work though perhaps in a way not to management's liking, to "poor production," which would suggest a far lesser amount of work. Moreover, both courts seized upon the absence of statistical evidence in her case, but it is respectfully suggested that she was a statistic of one--one woman in an otherwise all-male job--making further statistical proofs unnecessary. Even so, Petitioner presented hard statistical data from Southwestern Bell management officials that women at that time comprised less than one tenth of one percent of the "craft" workforce (79 Tr. 141).

If Petitioner, in her application, training and demotion, had suffered only one or two of the incidents alleged, they could be dismissed as quirks of fate not rising to the level of unlawful discrimination. But when one person, notably a woman in a heretofore male position, is the victim of a number of such incidents, their dismissal as "quirks of fate" becomes a denial of her right to equal opportunity employment guaranteed under Title VII of the Civil Rights Act of 1964. Coupled with the documented incidents of harassment she suffered after her removal from the testboard, and the filing of her EEOC discrimination charge, which the lower courts also chose to ignore, it is apparent that Petitioner was the victim of invidious sexual discriminations and harassment. But for the fact that she is a woman, Miss Wood would not have been treated as she was by Respondent.

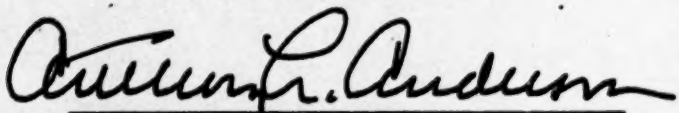
Moreover, it is respectfully suggested that a careful reading of the record will find some evidence to suggest that Respondent may have "manufactured" reports after the fact to show Miss Wood in a bad light. Accordingly, certiorari should be granted.

CONCLUSION

For the foregoing reasons and authorities, Petitioner's Petition for Writ of Certiorari should be granted.

DATED June 23, 1981.

Respectfully submitted,



ANTHONY L. ANDERSON
Attorney for Petitioner

OF COUNSEL:

ANDERSON, PREUSS & ZWIBELMAN
222 South Meramec, Suite 300
Clayton, Missouri 63105
Telephone (314) 726-2552

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1028

Mary Josephine Wood,	*	
	*	
Appellant,	*	
	*	Appeal from the
v.	*	United States Dis-
	*	trict Court for the
Southwestern Bell	*	Eastern District
Telephone Company,	*	of Missouri.
	*	
Appellee.	*	

Submitted: October 13, 1980

Filed: January 19, 1981

Before STEPHENSON and HENLEY, Circuit Judges, and HUNTER*, District Judge.

HUNTER, District Judge.

Mary Josephine Wood appeals from the

---

*The Honorable Elmo B. Hunter, United States District Judge, Chief Judge for the Western

judgment of the district court[1] which found that Southwestern Bell Telephone Company (hereinafter Southwestern Bell), appellee, did not discriminate against appellant due to her sex and in violation of Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. §2000e et seq. We affirm.

On July 3, 1975, appellant filed her complaint against Southwestern Bell alleging sex discrimination. Summary judgment was granted by the district court[2] in favor of Southwestern Bell, but that ruling was reversed by this Court and the

---

District of Missouri, sitting by designation.

[1]The Honorable H. Kenneth Wangelin, United States District Judge, Eastern District of Missouri.

[2]442 F.Supp. 41 (E.D. Mo. 1977).

case was remanded to the district court.[3] The matter was tried to the district court. A memorandum opinion was filed and judgment entered on behalf of Southwestern Bell on September 18, 1979. This appeal followed.

Appellant alleges four points of error. First, the district court erred by finding Southwestern Bell had not discriminated against appellant in her application for, training in, and demotion from a deskman's position.[4] Second, the district court erred by finding that the appellant was not the subject of harassment or reprisal in violation of 42 U.S.C. §20003-(3). Third, it was error to find

---

[3]580 F.2d 239 (8th Cir. 1978).

[4]Appellant initially utilized the term "deskman" in her complaint. Throughout the course of this litigation that term has consistently been used to describe the employment position in question. We will continue to use the term for purposes of this appeal.

that appellant had not received disparate compensation in violation of 42 U.S.C. §20003-(2)(a)(1). And finally, the district court erred in failing to exclude witnesses from the courtroom after the trial to the court had begun.

I.

Appellant has a distinguished service background with Southwestern Bell. She has been with the company for 30 years and currently remains in their employ. She began with the company in 1950 as a junior clerk and was promoted in 1951, 1952, 1958 and 1965. Her promotion in 1965 was to the management position of personnal records analyst. In 1967, after a leave of absence, she returned to the non-management position of repair clerk.

Southwestern Bell is organized into various intra-company division. The plant division is divided into craft and

non-craft position. Prior to 1968 appellant's employment at Southwestern Bell had generally been in non-craft positions. In 1968 she made her first application for promotion to a craft position. After the form of her application had been approved by her union it was properly accepted by the company. After passing a craft test, required of all persons entering craft positions, she was awarded the job of deskman on the test board at the St. Louis midtown office of Southwestern Bell.

The job of deskman involved the operation of local testing facilities to test communication circuits and associated equipment. Appellant's responsibilities included analyzing trouble spots on equipment, dispatching repair forces, and locating and clearing communication problems between the company's central office and

the customer's premises. Appellant was also responsible for the preparation and maintenance of various records and reports relating to these duties. In short, the position of deskman, as the district court noted, required the use of rather unique analytical abilities.

Appellant remained at the position of deskman from December 1, 1968, until November 7, 1969, at which time she was removed and returned to her former position as a repair clerk. Thereafter, appellant continued to make bids for a deskman's position. These bids were denied and appellant filed her discrimination charge with the Equal Employment Opportunity Commission (EEOC) on April 7,1970.

Appellant began the job as a deskman along with four other individuals who were also new to that position. This group, including appellant, consisted of two

women and three men. Appellant initially received on the job training from other deskmen. After two months of such training a chief deskman, a management employee, was assigned to train her in the proper techniques and procedures involved in the position.

During appellant's first few months in the position of deskman her supervisors determined that she would be subject to a probationary period due to the unsatisfactory progress she was making in learning her new position. Her supervisors noted that she had difficulty in correctly analyzing the source of equpment trouble spots and in determining what corrective measures were necessary. Formal appraisals of appellant's progress were made on at least four separate occasions. Finally, on October 3, 1969, a formal appraisal by appellant's supervisors indicated that she

had made no improvement in her overall job performance and that her technical abilities were unsatisfactory. Appellant also received a poor appraisement of the productivity and quality of her work. After this final appraisal, it was recommended that she be assigned to a position more consistent with her capabilities.

II.

Appellant's first two claims of error may be review together. First, she argues that the district court erred by finding that she was not discriminated against in her application for, training in and demotion from a deskman's job. Second, she asserts the district court erred by finding that she was not the victim of harassment and reprisal as a result of the filing of her EEOC claim.

The complainant in a Title VII case carried the initial burden of establishing

a prima facie case of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Should the complainant establish a prima facie case of discrimination:

> the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as [sex] . . . To dispel the adverse inference from a prima facie showing [of disparate treatment] the employer need only "articulate some legitimate, nondiscriminatory reason for the employee's [treatment]."

Furnco Construction Corp. v. Waters, 438 U.S. 567, 577-78 (1978) quoting McDonnell Douglas Corp. v. Green, supra. See also Board of Trustees v. Sweeny, 439 U.S. 24, 25 (1978). The complainant is then entitled to rebut proof of legitimate, nondiscriminatory reasons for the employee's treatment by "introduc[ing] evidence that the proferred justification is merely a

pretext for discrimination." Furnco Construction Corp. v. Waters, supra, 438 U.S. at 578; McDonnell Douglas Corp. v. Waters, supra, 438 U.S. at 578; McDonnell Douglas Corp. v. Green, supra, 411 U.S. at 804-05. This Court has recognized this three-tiered approach in many of its recent decisions. McCosh v. City of Grand Forks, 628 F.2d 1058, 1062 (8th Cir. 1980); Reeb v. Marshall, 626 F.2d 43, 45 (8th Cir. 1980); Ligons v. Bechtel Power Corporation, 625 F.2d 771, 773 (8th Cir. 1980); Coleman v. Missouri Pacific Railroad Co., 622 F.2d 408, 410 (8th Cir. 1980); Osborne v. Cleland, 620 F.2d 195, 198 (8th Cir. 1980); Womack v. Munson, 619 F.2d 1292, 1296, (8th Cir. 1980); Kirby v. Colony Furniture Co., 613 F.2d 696, 702 (8th Cir. 1980).

From the district court's memorandum opinion it is unclear whether the court's finding to establish a prima facie case or her failure to carry the ultimate

burden of persuasion that she was discriminated against due to her sex. For purposes of this appeal we will assume that appellant made out a prima facie case of discrimination at the trial level.

It is clear from the record that Southwestern Bell successfully carried its burden of producing evidence which articulated legitimate, non-discriminatory reasons for the treatment accorded appellant. The district court found that the appellant received intense training with the other individuals who began as deskmen with her, and that in fact, she received more on the job training that any of the others in her group. The district court found this additional training to be necessitated by appellant's lack of background in craft work and by the continued appraisals of her work which indicated that she needed improvement in several areas. The

district court further found that all the beginning deskmen in appellant's group made satisfactory progress, except appellant, despite the many efforts to train her; and that appellant was demoted from her position as a deskman due to her inability to perform the job satisfactorily, and not as a result of her being a female. Finally, the district court found that there was no credible evidence of harassment or reprisal against appellant as a result of the filing of her EEOC charge.

Our close review of the entire record indicates that the district court's findings of fact were not clearly erroneous. Johnson v. Nordstrom-Larpenteur Agency, Inc., 623 F.2d 1279, 1281 (8th Cir. 1980); F.R.Civ.P. 52(a). The evidence adduced at the trial amply supported each of them. These findings of fact support the conclusion that Southwestern Bell did not

discriminate against appellant in her application for, training in and demotion from the deskman's position. The district court's findings of fact also are sufficient to support its conclusion that the appellant was not the victim of harassment or reprisal. The evidence in the record supports the trial court's finding that appellant was demoted from the position of deskman because of her unsatisfactory performance in that position, and that her poor performance was not the result of disparate treatment due to her sex.

III.

The district court also concluded that appellant was not discriminated against regarding the compensation paid to her as a deskman. Appellant disputes this conclusion. She argues that she was paid a wage which was less than that paid

to other male deskmen whose overall seniority with the company was the same as hers[5] and that this treatment violated 42 U.S.C. §2000e-2(a)(1).[6]

The facts underlying this allegation of error were mostly undisputed at trial. When appellant held the position of repair clerk she earned $110.00 per week. A repair clerk is a non-craft position. When appellant was promoted to deskman, a craft

---

[5]At trial appellant sought recovery for the alleged disparity in pay under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1). She did not allege a violation of the Equal Pay Act, 29 U.S.C. §206(d).

[6]42 U.S.C. §2000e-2 states, in pertinent part:

> (a) Employers. It shall be unlawful employment practice for an employer --
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national original . . .

position, she was included with a group of four other individuals who were also promoted to craft positions as beginning deskmen. As a beginning deskman, appellant's salary was $114.00 per week. This represented the highest salary in the group with which she began.[7] Employees who had been deskmen longer than appellant, but who had the same overall seniority with the company as appellant, were paid a higher wage.

After a careful review of the record and the district court's findings we conclude that the factor most affecting appellant's pay, in relation to other deskmen, was seniority <u>within</u> the craft position

---

[7]Of the five individuals who started as deskmen in that group, appellant was paid $114.00 per week; Mr. Moore $99.50 per week; Mr. Klein $91.50 per week; Mr. Johnson $90.50 per week; and Ms. Williams $93.00 per week.

itself. The system at Southwestern Bell was structed so that seniority within a craft position, not overall seniority with the company, governed appellant's rate of pay.[8] Generally, pay rates and pay progressions were governed by the Collective Bargaining Agreement entered into between appellant's union and Southwestern Bell. This agreement determined what individuals were paid when they entered a craft position, regardless of their overall

---

[8]It is important to note that appellant's transfer from a non-craft position to a craft position did not result in the forfeiture of her overall seniority with the company, Had such a forfeiture occurred we would then be compelled to review Southwestern Bell's seniority system in light of the analysis used in United States v. N. L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973). However, under the seniority system at issue in this case, appellant's overall seniority was still determinative for such benefits as choice of hours, choice of vacation weeks, and choice of overtime worked. Her overall seniority also affected job-bidding and promotion.

seniority with the company.[9] Subsequent pay progressions were then based on seniority within the craft.

We are in agreement with the findings of the district court that the disparity in appellant's pay and that of other deskmen was due to her lack of seniority as a deskman and not the result of sex discrimination.[10]

Since the difference in pay appellant complained of was the result of the prevailing seniority system, and not because of her sex, the issue is whether such a pay difference can be validly based on the seniority system used by appellee. We are

---

[9]Even though appellant's salary as a repair clerk in a non-craft position exceeded the maximum beginning salary provided for a deskman, the appellant received a nominal raise of $4.00 per week as part of her promotion.

[10]The district court also found, as a factual matter, that craft positions were more technical than non-craft positions, required unique analytical skills, and were higher paid than non-craft positions. Our review of the record

persuaded that in the light of the facts of this case it can.

The provisions of 42 U.S.C. §2000e-2 (h) make it clear that a bona fide seniority system is a valid defense to the application of different standards of compensation.[11] A bona fide seniority system is

---

indicates that these findings are not clearly erroneous.

[11] 42 U.S.C. §2000e-2(h) states, in pertinent part:

> (h) Seniority or merit system; ability tests. Notwithstanding any other provision of this title (42 U.S.C. §§2000 e et seq.), it shall not be an unlawful employment practice of an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . .

defined as one that is based on pertinent objective criteria impartially applied to all employees. Acha v. Beame, 570 F.2d 57, 64 (2d Cir. 1978); United States v. St. Louis-San Francisco Railway Co., 464 F.2d 301, 309 (8th Cir. 1972), cert. denied, 409 U.S. 1116 (1973). The seniority system utilized by Southwestern Bell applied equally to all employees in the craft position, regardless of race or sex. Further, the record does not contain evidence to indicate that the seniority system in question, though neutral on its face, acted to perpetuate past discriminatory practices.[12] Thus, the disparity in compensation experienced by the appellant was the result of a bona fide

---

[12]Seniority systems which are neutral on their face have been held to be invalid if they perpetuate the effects of past discriminations. United States v. N. L. Industries, Inc., 479 F. 2d 354 (8th Cir. 1973); United States v. St. Louis-San Francisco Railway Co., 464 F.2d 301

seniority system and not the result of sexual discrimination.

IV.

Appellant finaly argues that the district court erred in failing to exclude witnesses from the courtroom, pursuant to Fed. R. Evid. 615,[13] after appellant had moved for such exclusion. The motion for exclusion of the witnesses came on the second day of trial, after some of appellant's witnesses had testified. The district court denied appellant's motion on the ground that itwas not timely made.

(8th Cir. 1972), cert. denied, 409 U.S. 1116 (1973).

[13] Fed. R. Evid. 615 states:
At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize the exclusion of (1) a party who is a natural person, or (2) an officert or employee of a party which is not a natural person designated as its

The witnesses who testified on the first day of trial were management level employees of Southwestern Bell.[14] After the district court denied appellant's motion to exclude, these witnesses were allowed to remain in the courtroom during the testimony of the other witnesses. Appellant alleges that the presence of witnesses in the courtroom, who were management level employees of Southwestern Bell, adversely affected the credibility and substance of later testimony by witnesses who were non-management employees. Appellant contends this adverse effect occurred because the non-management employees feared reprisals from the management level employees present in

---

representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

[14] These witnesses were called to testify by appellant.

the courtroom. [15]

It is clear from the wording of Rule 615 that generally the exclusion of witnesses so they cannot hear the testimony of other witnesses is required when requested by a party. [16] United States v. Warren, 550 F.2d 219, 227 (5th Cir. 1977), rehearing denied, 558 F.2d 605 (5th Cir.), cert. denied, 434 U.S. 1016 (1978). Rule 615 does not specifically require that the exclusionary request be made at any particular stage of the trial.

We need not decide whether the exclusionary request made by appellant was erroneously denied, for the law requires that any such error must be one that is

---

[15] The purpose of Rule 615 has been described as "exercis[ing] a restraing on witnesses 'tailoring' their testimony to that of earlier witnesses; and aid[ing] in detecting testimony that is less than candid." Geders v. United States, 425 U.S. 80, 87 (1976).

[16] The Rule itself contains several specific

prejudicial to the party requesting exclusion. Otherwise, it will be considered harmless error. United States v. Warren, supra. The record does not reveal, and the appellant has been unable to show, that she was prejudiced by the ruling of the district judge. There has been no showing that the credibility or substance of any of the testimony from non-management employees was adversely affected. Nor can an inference of adverse effect be fairly drawn from the record. Appellant has also failed to demonstrate that non-management employees feared reprisals, were threatened with reprisals, or experiences any reprisals as a consequence of their testimony.

---

exceptions to the exclusion of witnesses on request. See note 13, supra.

This case was tried to the court, not to a jury. Any effect on the credibility or substance of testimony at the trial could best be ascertained and weighed by the district judge. He had the opportunity to view first hand the conduct and demeanor of the witnesses and to consider their credibility. Absent a clear abuse of discretion by the judge who saw and heard the witnesses we must defer to this finding on matters of witness credibility. Kendrick v. Commission of Zoological Subdistrict, 565 F.2d 524 (8th Cir. 1977).

The judgment of the district court is affirmed.

APPENDIX "B"

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MARY JOSEPHINE WOOD, Plaintiff,	)	
vs.	)	No. 75-580 C (1)
SOUTHWESTERN BELL TELEPHONE COMPANY, Defendant.	)	

MEMORANDUM

This matter is before the Court for a decision on the merits. In the instant case, it is plaintiff's contention that she was treated discriminatorily by defendant due to her sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. Plaintiff's complaint sets forth four counts alleging: (1) Insufficient and

improper training to enable the plaintiff to fill the position of deskman and disparate salary treatment because of the craft, non-craft distinction; (2) discrimination by virtue of disparate and improper training prior to and during her term as deskman; (3) discrimination due to her removal from the position of desk man and defendant's subsequent refusal to rehire her into that position; and (4) harassment, reprisals, and discrimination subsequent to her demotion due to her protestations of defendant's policies.

The Court, having considered the pleadings, the testimony of the witnesses and documents introduced at both trials, the stipulations of the party, and being otherwise fully advised of the premises, hereby makes and enters the following findings of fact and conclusions of law. Any finding of fact

applicable as a conclusion of law is hereby adopted as such by the Court. Conversely, any conclusion of law applicable as a finding of fact is hereby adopted as such by the Court.

Findings of Fact

1. Defendant Southwestern Bell Telephone Company is a corporation duly organized and existing under the laws of the State of Missouri and engaged in the business of providing telephone service.

2. Plaintiff is an employee of defendant with more than twenty nine (29) years of service.

3. Plaintiff was first employed by defendant in 1950 as a junior clerk; thereafter, in 1951, plaintiff was promoted to benefit clerk; and in 1952, she was promoted to personnel records clerk. Plaintiff remained in that position until November of 1958 at which time

she was promoted to senior stenographer. Approximately seven (7) years later plaintiff was promoted to personnel records analyst, her first and only management position. In August of 1967, after a short leave of absence, plaintiff transferred to the plant department as a repair clerk, a non-management, non-craft position.

4. On October 21, 1968, plaintiff applied for a desk man's position at the Jefferson Exchange. The form of the application was rejected by the union and on October 31, 1968, she reapplied for the next opening under the classification of desk man at the Jefferson Exchange. Prior to assuming the position of desk man, plaintiff took, and passed, defendant's "craft" test.

5. Defendant is divided into the following operating departments: Traffic, plant, comptrollers, commercial

and business. The plant department is divided into craft and non-craft positions; the craft positions being the higher paid and more technical of the plant positions; the non-craft being a less technically oriented position.

6. Prior to October of 1968, plaintiff never submitted a job bid, a transfer request or a letter to defendant's management employees requesting a job assignment in a craft position. Nor did she make in any manner such a desire known. Her application for employment with defendant indicated she desired to work in an office or as an operator.

7. During her term as a repair clerk, plaintiff was evaluated by her various supervisors and considered to be a good repair clerk. As a result, plaintiff requested the position of desk man in the mid-town district of defendant's St. Louis operations.

8. A repair clerk receives recorded reports of service trouble; prepares and maintains associated records and reports; transcribes service order entries to certain maintenance records; posts and prepares service order log records where required, and performs other associated related tasks.

9. The position of desk man requires the operation of local testing facilities to test communications circuits and associated equipment. A desk man is responsible for analyzing trouble reports, dispatching repair forces, and cooperating in locating and clearing communication problems between the defendant's central office and the customer's premises. A desk man is also responsible for dispatching plant forces on service order work and the preparation and maintenance of related records and reports.

10. The testimony at trial indicated that the position of desk man requires rather unique analytical abilities.

11. Plaintiff, due in no small part to her utilization of defendant's employee tuition plan, possesses a superior educational background. Plaintiff began night school at Washington University in Fall of 1958 and received a Bachelor of Science degree in Education in June of 1968.

12. Plaintiff began a training program concomitant with her appointment to the desk man position effective December 1, 1968. The training program reviewed all practices relating to her job and also included orientation with respect to the main frame and central office switching equipment where calls from one party coming in on one line are switched to the line of the called

party. From February 17, 1969, to April 15, 1969, plaintiff, together with four (4) other new desk men, (three men and one woman) received intense individual training from Jack Wann, chief desk man, assigned solely for the purpose of giving such instruction.

13. Plaintiff's group was the first group of prior non-craft employees to go on the test board. All the new desk men had normal difficulties in grasping the complexities of the position. However, with the exception of the plaintiff, each made satisfactory progress and was retained as a desk man. This, in spite of the fact that plaintiff had more on-the-job training and more people training her than the others in her group. Plaintiff would have this Court characterize defendant's repeated extensive and sincere efforts to train plaintiff while

on the job as disparate training and evilly motiviated observation intended to harass plaintiff off the job. Such a position is entirely contrary to the credible evidence adduced at trial. It is apparent to this Court that neither the appointment of plaintiff as a desk man nor her training were discriminatory. Plaintiff did receive additional training, at least on a quantitative basis. However, such training arose not from defendant's desire to harass plaintiff but rather from the fact that she did not have a background in craft work and that continuing appraisals of her work indicated that she definitely needed improvement in several respects.

14. On at least four occasions, plaintiff's supervisors made formal appraisals of plaintiff's progress as a desk man. In each case her rate of progress was found unacceptable and

plaintiff was advised that her performance would have to improve. Plaintiff's primary problems were analyzing the source of the trouble and knowing what to do with what she tested. Plaintiff was more than adequate in collecting data but could not then assimilate the data, make a decision in analyzing the trouble, dispatch the repair forces and then give the repair personnel definitive assistance in clearing up the problem. Different analytical approachs are often used by successful desk men in assimilating the data and arriving at a conclusion. Plaintiff is a meticulous individual who preferred to work from a written set of specific instructions. Often she would ask a fellow employee how to perform a test and the employee would then try to explain it to her. Later she would ask another employee who would explain it in a slightly different manner which was not exactly

the way the first employee had told her to do it, but would get the same results. She would then point out to the second employee that that's not how the first employee told her to do it. Plaintiff often became highly critical in pointing out the different methods utilized and after awhile the desk men became less willing to help her. Plaintiff's frequent use of unnecessary tests, obsession with unnecessary details, and indecisiveness lead to her poor productivity.

15. Finally on October 3, 1969, plaintiff was found unsatisfactory in a formal appraisal and it was noted that she had shown no improvement in her over-all job performance and that her technical ability remained weak. It was also noted that her quality and productivity were not acceptable considering the training she had received and the time

she had been a desk man. It was noted that the plaintiff worked steadily, but due to her inability to understand and remember the technical instructions, she made unnecessary tests which resulted in ppor productivity. Plaintiff was advised that it would be recommended she be reassigned to a position more suitable for her capabilities.

16. Plaintiff appealed to the union and as a result of a meeting between the union and the company it was agreed to give plaintiff four additional weeks of training and a chance to improve. Plaintiff was advised that if her progress was not satisfactory she would then be removed from the desk man position. A different supervisor was assigned to her work group to appraise her performance.

17. On October 24, 1969, the union was advised that there had been no change in her progress in the initial

two week period and her performance was still unsatisfactory.

18. On November 7, 1969, a different supervisor who had observed and worked with plaintiff for the four week period concluded that although the plaintiff was determined and had a good attitude and was a hard worker, it was his opinion that she would never make a desk man. He found her lacking in the ability to organize, formulate a positive plan of action and complete a particular assignment in a reasonable period of time.

19. All of her immediate supervisors who had an opportunity to observe her performance concluded that she lacked the aptitude necessary to perform the job of desk man and it was decided to reassign plaintiff to the position of repair clerk effective November 9, 1969.

20. Plaintiff's removal

from the test desk position was a result of her inability to perform the job satisfactorily and not a result of her being a female.

21. Although the plaintiff has alleged further discrimination, harassment and reprisal by defendant since her demotion, no credible evidence of such discrimination, harassment and reprisal exists.

22. Defendant made every effort to train plaintiff for the position of desk man. The fact that the position of repair clerk failed to properly train her for the position of desk man is without legal effect. The facts establish that there is no position in the craft or noncraft ranks which is a stepping stone to a higher position.

23. Defendant did not discriminate against plaintiff in failing

to rehire her into the position of desk man in that plaintiff had demonstrated her inability to perform the work required of a desk man. Since her removal from the desk man position, plaintiff has not taken any training to improve her qualifications as a desk man.

24. During her tenure as a desk man, plaintiff was paid in accord with the collective bargaining agreement in effect and plaintiff started with the highest wage of any of the five desk men in her group.

Conclusions of Law

Defendant Southwestern Bell Telephone Company did not discriminate against plaintiff in that it did not, during the period referred to in plaintiff's complaint, maintain sex segregated positions or provide training which in any

manner could be shown to be discriminatory with respect to plaintiff due to her sex.

During the period of time the plaintiff performed duties as a desk man defendant did not discriminate in any respect against plaintiff in the manner of instruction provided or treatment of plaintiff. Defendant did not discriminate against plaintiff in removing plaintiff from the desk man position and returning her to a repair clerk, a non-craft position. Defendant has not at any time discriminated against plaintiff as a result of her sex nor has defendant retaliated nor initiated reprisal actions against plaintiff for any reason whatsoever. Plaintiff has wholly failed to present any credible probative evidence or statistics tending to show that defendant discriminated against her due to her sex.

Plaintiff's continued employment by defendant, her substantial wage increases since 1968 and her continued enjoyment of defendant's employee benefit plan are inconsistent with her contentions of sexual discrimination and raises strong inference that there has been no discrimination by defendant. Defendant Southwestern Bell Telephone Company is, therefore, entitled to judgment and this Court will enter its judgment and decree in favor of defendant Southwestern Bell Telephone Company and against the plaintiff.

Dated this 18th day of September, 1979.

/s/ H. Kenneth Wangelin
H. Kenneth Wangelin
United States District Judge

APPENDIX "C"

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

* * *

Case No. YSL4-503
Charge No. TSL0-0027

Mary Josephine Wood
6812 Edison
Velda Village, Missouri 63121

CHARGING PARTY

vs.

Southwestern Bell Telephone Company
100 North 12th Street
St. Louis, Missouri 63101

RESPONDENT

DETERMINATION

Under the authority vested in me by Section 1601.19b (d) of the Commission's Procedural Rules, 37 Fed. Reg. 20165 (September 27, 1972), I issue on behalf of the Commission, the following determination as to the merits of the subject charge.

Respondent is an employer within the meaning of Title VII and the timeliness and all the other jurisdictional requirements have been met.

Charging Party alleges that Respondent demoted her from a craft position to a non-craft position; that Respondent adversely affected her terms and conditions of employment; that Respondent

failed to pay her equal wages to those paid similarly situated males.

Respondent contends that Charging Party was demoted for reasons pertaining to her overall poor work performance.

It is undisputed that Charging Party had an excellent employment record prior to becoming a deskman, that she was one of the first female employees in St. Louis to enter the formerly all-male job classification of deskman, and that she had no prior craft experience. That Charging Party was more or less qualified to retain the job of deskman is a matter of dispute, although substantial records were maintained that indicate that Respondent was less than satisfied with her performance as a deskman. Charing Party, as a female, had previously been confined to female jobs, and thus the training she was afforded, although presumably equal to that afforded other employees (all of whom were male with one exception) was not geared to her or any other female lacking craft experience, due to Respondent's previously sex-segregated job classifications. To demote Charging Party, while she was suffering under the special disadvantage brought about by her past experience with Respondent, was to take action against her based on past discrimination, and to perpetuate that discrimination becuase of her sex.

Further, evidence of record shows that Charging Party was given 4 appraisals, the first of which (2-69) was unsatisfactory. Charging Party was put on probation, which she successfully completed, and was given two other

appraisals (3-69, 5-69) on both of which Charging Party was rated fair. On the final appraisal (10-69) Charging Party was rated poor in ability, performance and productivity. Respondent states that no records are kept on productivity however, and that there are no productivity standards by which deskman are measured.

The record clearly indicates a pattern of intense scrutiny of Charging Party, as well as a total lack of any disciplinary action or formal warnings to Charging Party regarding her performance prior to her demotion (with the exception of the probation on which Charging Party was placed after nin weeks as deskman). Evidence also shows that Charging Party did above average work in the only formal training she received.

Based on the foregoing the Commission finds reasonable cause to believe that Charging Party was demoted because of her sex, as alleged.

Charging Party has alleged that she was harassed by management and co-workers because of her sex. Respondent records show that Charging Party was in fact, subjected to different treatment from that to which males were subjected. Respondent has no records of complaints by Charging Party of co-worker harassment. Based on the foregoing, and giving substantial weight to Charging Party statements, the Commission can infer that Charging Party, as a woman entering a field previously dominated, "manned", and supervised by males, did suffer from co-worker harassment, as well as disparate treatment by management, because

of her sex, female, as alleged.

Charging Party also alleges that she was not paid wages equal to those of similarly situated males. Evidence of record substantiates that Charging Party was paid less wages than males with less seniority, due to Respondent's policy governing movement of employees from non-craft to craft positions. The Commission finds that such a policy has a negative and foreseeable disparate impact on females as a class and Charging Party in particular, due to Respondent's past maintenance of sex-segregated job classifications, and thus that Charging Party was paid less wages than similarly situated males because of her sex, within the scope and meaning of Title VII.

Growing out of the investigation is the issue of reprisal under Section 704A of Title VII. Respondent's statements to the Commission, as well as Respondent's keeping of records related to Charging Party's public opposition to Respondent's Title VII discrimination both serve to evince a clear pattern of reprisal from which the Commission is impelled to infer a retaliatory refusal to promote Charging Party, within the meaning of Title VII.

Having determined that there is reasonable cause to believe that the charge is true, the Commission now invites the parties to join with it in a collective effort toward a just resolution of this matter. We enclose an information sheet entitled "Notice of Conciliation Process" for the attention of each party. A representative of this office will be in contact with each party in the near future to

begin the conciliation process.

On behalf of the Commission:

December 4, 1973
Date

/s/ Eugene P. Keenan
Eugene P. Keenan,
District Director

APPENDIX "D"

STATUTES AND REGULATIONS INVOLVED

42 USC §2000e et seq.:

§2000e Definitions

Federal Rules of Evidence; Rule 615:

"At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize the exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause."

Federal Rules of Civil Procedure, Rule 52(a)

Effect. In all actions tried upon the facts with a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless

clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

EQUAL EMPLOYMENT OPPORTUNITIES

§2000e. Definitions

For the purposes of this title [42 USCS §2000 et seq.] -

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code [5 USCS §2102]) or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954 [26 USCS §501(c)], except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972 [Mar. 24, 1972], persons having fewer than twenty-five employees (and

their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972 [Mar.

24, 1972], or (B) fifteen or more thereafter, and such labor organization--

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organizationrecognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees or employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organziation representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) has the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer

to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j)The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an

employer demonstrates that he is unable to reasonably accomodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

§2000e-2 Discrimination because of race, color, religion, sex, or national origin

(a) Employers. It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency. It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization. It shall be unlawful employment practice for a labor organization--

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs. It shall be unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retrainong, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Religion, sex, or national origin as bona fide occupational qualification; educational institutions with employees of particular religions. Notwithstanding

any other provision of this title [42 USCS §§ 2000e et seq.], (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in the community, State, section, or other area.

Office-Supreme Court, U.S.
FILED
AUG 24 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2192

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MARY JOSEPHINE WOOD,
Petitioner,
v.
SOUTHWESTERN BELL TELEPHONE COMPANY,
Respondent.

On Writ Of Certiorari From The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

JAMES A. DAUGHERTY
JOHN D. RAHOY
JACK C. LORENZ
LEO E. EICKHOFF, JR.
Southwestern Bell Telephone Company
100 North Tucker Boulevard, Room 630
St. Louis, Missouri 63101
Attorneys for Respondent

OF COUNSEL:
Edgar Mayfield

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

TABLE OF CONTENTS

	Page
Preliminary Statement	1
Respondents Brief in Opposition to Petitioner's Petition for Writ of Certiorari	1
Argument	6
A. The United States Court of Appeals for the Eighth Circuit Did not Commit Error nor Depart from the Accepted Course of Judicial Proceedings when it Affirmed the Trial Court's Decision that the Respondent had not Discriminated Against Petitioner and had Compensated Her at a Rate Commensurate with Male Employees.	7
B. The Court of Appeals did not Commit Error Nor did it Depart from the Accepted and Usual Course of Judicial Proceedings when it Affirmed the Trial Court's Overruling of Petitioner's Motion for the Exclusion of Witnesses.	10
C. The Lower Courts Correctly Ruled that the Respondent had not Discriminated Against the Petitioner in Violation of Title VII of the Civil Rights Act of 1964 Under the Circumstances Surrounding Her Application for, Training in, and Demotion from, a Deskman's Position.	11
Conclusion	21

TABLE OF AUTHORITIES

Braswell v. Wainright, 330 F.Supp. 281 (D.C. Fla. 1971) 11

Cedeck v. Hamiltonian Federal Savings & Loan Ass'n, 551 F.2d 1136 (8th Cir. 1977) 18

Copeland v. U.S., 343 F.2d 287, 120 U.S.App. D.C. 5 (1964) 10

Dent v. St. Louis San Francisco Railway Co., 265 F. Supp. 56 (D.C. Ala. 1967) 20

DiSalvo v. Chamber of Commerce, 568 F.2d 593 at 596 [2,3] (8th Cir. 1978) 17

Everett v. TWA, 298 F.Supp. 1099 (D.C. Mo. 1959) ... 20

Falkowski v. Perry, 464 F.Supp. 1016 (D.C.Ala. 1976) . 19

Glus v. G.C. Murphy Co., 562 F.2d 880 (3rd Cir. 1977). 20

Johnson v. Seaboard Air Line R-R Co., 405 F.2d 645 (4th Cir. 1968) 20

Lewis v. General Motors Corp., 557 F.2d 1255 (8th Cir. 1977) 17

Local 179 United Textile Workers of America, ALF-CIO v. Federal Paper Stock Company, 461 F.2d 849 (8th Cir. 1972) 20

Mead v. U.S. Fidelity & Guaranty Co., 442 F.Supp. 318, aff'd 545 F.2d 222 19

Middleton v. Remington Arms Company, Inc., 594 F. 2d 1210, at 1213[2] (8th Cir. 1979) 12

Mickel v. S.Car State Empl. Service, 377 F.2d 117 (D.C. Cir. 1974) 20

Naraine v. Western Electric Co., 507 F.2d 590 (8th Cir. 1974) 16

Pack v. Energy Research and Development Administration, 566 F.2d 1111 (8th Cir. 1977) 18

Parson v. Kaiser Aluminum & Chemical Corp., 575 F. 2d 1374 (5th Cir. 1978) 16

Shull v. Dain, Kalman & Quail, Inc., 561 F.2d 152, at 155[2] (8th Cir. 1977) 16

Sokolowski v. Swift & Co., 286 F.2d 880 (D.C. Minn. 1968) 20

Texas Dept. of Community Affairs v. Burdine, 450 U.S. ____, 67 L.Ed. 207, 101 S.Ct. 1089 (1981) 18

Tuft v. McDonnell Douglas, 581 F.2d 1304 (8th Cir. 1978) 12

U.S. v. Leggett, 326 F.2d 613 (C.A.N.C. 1964), *cert. den.* 84 S.Ct. 1633, 377 U.S. 955, 12 L.Ed.2d 499 . 11

U.S. v. Robinson, 502 F.2d 894 (7th Cir. 1974) 10

United States v. St. Louis-San Francisco Railway Co., 464 F.2d 301 (8th Cir. 1972) 9

Rule 615, Federal Rules of Evidence, 28 U.S.C.A. 11

Supreme Court Rule 19, 28 U.S.C.A. 6

Time Requirements for Civil Actions for Violation of Equal Employment Opportunity Provisions under §706 of the Civil Rights Act of 1964, 4 A.L.R. Fed. 833) 20

Title VII of the Civil Rights Act of 1964, 42 U.S.C.A., §2000(e) 1,2,11,16,18,20

42 U.S.C.A., §2000(e)(3) 19

88 C.J.S., Trial §§65, 66 10

75 Am.Jur.2d, Trial §61 10

No. 80-2192

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MARY JOSEPHINE WOOD,
Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Respondent.

On Writ Of Certiorari From The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

PRELIMINARY STATEMENT

Respondent generally agrees with Petitioner's jurisdictional statement but denies that this Court has any jurisdiction with respect to Petitioner's allegations of harassment and retaliation under Title VII of the Civil Rights Act of 1964.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

The Statement of the Case in the Petition for Writ of Certiorari is incomplete and omits certain material evidence. Therefore, Respondent submits the following Supplemental Statement of the Case, which provides necessary insight to the Court for the proper determination of Petitioner's request for

review of the decision of the United States Court of Appeals for the Eighth Circuit.

The instant proceedings arises as a result of Petitioner's allegations of discriminatory treatment by her employer (Respondent) due to her sex. Suit was brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §2000(e) *et seq.*

Petitioner complains of discrimination by reason of improper training for the position of Deskman (Count I), of discrimination during her tenure as a Deskman (Count II), of discrimination in connection with her demotion from Deskman to Repair Clerk and her five unsuccessful subsequent applications to return to the position of Deskman (Count III); and of discriminatory harassment and reprisals following her demotion (Count IV). Respondent submits the decision of the lower courts in its favor is supported by the evidence adduced at trial and applicable statutes and judicial decisions.

The facts of the case are not terribly complex.

The Petitioner was employed by Respondent as a stenographer on April 18, 1950. (Def. Ex. P)[1] On November 16, 1965, she accepted a management position entitled personnel records analyst. (Def. Ex. L) During this period of employment with Respondent, Petitioner obtained a college degree under Respondent's College Tuition Plan and is a qualified secondary teacher in English and Spanish. (79 Tr. 499) Following an approved leave of absence, on August 2, 1967, she accepted the position of repair clerk in Respondent's plan department. (Def. Ex. L) She applied for and was accepted as a deskman on December 1, 1968. (Def. Ex. L) Deskmen are required to operate from a "Test Desk position" to test, analyze and direct repair forces on complicated communications circuits, including wires and telephone sets of residential and business customers throughout an assigned geographical area.

[1] Defendant's Exhibits A-T were offered and admitted at Page 577 of the record.

During Petitoner's first few days on the job, she received orientation and training. (79 Tr. 292) In February, 1969, after two months of training, Respondent assigned an experienced Chief Deskman, a management employee, (79 Tr. 364) to instruct and train Petitioner and other new testers in the proper testing techniques to locate trouble, analyze it and to determine the needed repairs. (79 Tr. 305)

One supervisor (McGrath, 79 Tr. 46, 58), who supervised Petitioner from December, 1968 through August 1, 1969, placed her on probation because he observed her difficulty in grasping the basic theory of maintenance testing (79 Tr. 45); because she placed excessive written comments on the "trouble tickets" with resulting delay in repair procedures (79 Tr. 51); and because she continually used the incorrect terminology, resulting in confusion in expediting repairs. (79 Tr. 52) He further observed that Petitioner was able to understand written instructions, but was unable, after she had conducted the testing procedures, to determine what repair procedures were required. (79 Tr. 71) He stated she had performed every other job she had had with Respondent very well, and that he wanted her to become an acceptable tester. (79 Tr. 76-78) At the time of Petitioner's placement as a deskman, there was and continued to be no requirement that a tester have prior craft experience. (79 Tr.81)

Another first level supervisor (Schomogy, 79 Tr. 293), who had observed Petitioner's job performance every day, stated that during his supervision of Petitioner, he recommended she be placed on probation because she did not make the proper tests and her production was low (79 Tr. 303). This was done in February, 1969. (79 Tr. 303)

Petitioner's work deficiencies were also observed by her coworkers, including Delores Stewart (79 Tr. 449), a frameman (a craft position), who worked with the testers, including Petitioner. She stated that the Petitoner would not provide informa-

tion needed to do her job as a frameman. Petitioner would provide information in technical terms, but did not tell her the information she required to do her job. (79 Tr. 513) She related that the Petitioner was a slow worker. (79 Tr. 518) She also stated that during her employment with Southwestern Bell, she had not been treated differently than males because of her sex. (79 Tr. 510)

In addition to the supervisors referred to above, other of Petitioner's managers who supervised her found that she had performed the job unsatisfactorily for the eleven-month period she held the position, and that in their contacts with her, they treated her as they did other employees. (79 Tr. 28, 29, 71, 128)

Another supervisor who supervised the Petitioner in October and November, 1969 (79 Tr. 269, 274) stated that while her attitude, determination and education presented a good impression (79 Tr. 280-282), he observed that she understood the various instructional pamphlets and practices, but was unable to learn the facts of a particular repair problem and was of the opinion she was not making acceptable progress in performing the job. The reasons were that she wasn't understanding and applying the basic testing procedures and was talking excessively with subscribers (Def. Ex. C, p. 2)[1]; she made too many notes (Ex. C, p. 3); her technical ability was weak (Ex. C, p. 8); she spent too much time on minor details (Ex. C, p. 8); her judgment was weak (Ex. C, p. 9); she couldn't analyze trouble reports (Ex. C, p. 16); she made too many notes (Ex. C, pps. 18, 19, 20); the quality of her testing and her productivity were not acceptable (Ex. C, p. 26); she had difficulty following the technical procedures (Ex. C, p. 39) and her overall job performance was unsatisfactory. (Ex. C, p. 40)

On November 9, 1969, Petitioner was demoted from deskman and returned to the position of repair clerk, for the reason that she was unable to perform the required duties of a tester. (Def. Ex. L)

other employee complaints. Petitioner chose not to pursue that remedy. She did not lodge a charge of disparate pay treatment with the Equal Employment Opportunity Commission, nor has she ever sought relief under the Equal Pay Act. [29 U.S.C.A. 206(d)(1)]

The non-supervisory, employee compensation provision in Section 2 of Art. 2 of Art. III of the Agreement (Ex. H) specified that rates of pay, progression schedules and exchange classifications as used in determining rates of pay applicable to employees, when, regardless of seniority, they enter into a craft position as deskman. When Petitioner, at her request, was assigned duties as a deskman, her salary was in excess of that provided for a beginning tester. However, since it was a promotion, she received a minor increase in pay, which was the highest rate of pay in her starting group, and thereafter Petitioner remained at the highest rate of that group with whom she began her employment as a tester. (Def. Exs. H and L)

Petitioner's interpretation[2] of the Collective Bargaining Agreement that she was paid less than males (of which there was no evidence), is mistaken because all craft jobs were compensated for on the basis of an employee's service—or seniority—for the employee's period of service *within* the *craft* classification pay scale. (Def. Ex. H, p. 45 and Note (B), p. 46) The employee's overall seniority was not disregarded because it was still the determining factor for choice of hours of work; choice of vacation weeks; and choice of overtime worked. Moreover, it was a significant factor in job-bidding and promotions, but it did not provide a basis for salary placement at a level higher than that provided by the craft pay scale. After her application, her passing of the craft test enabled her to be considered for the testing position, and due to her seniority, she was placed in that position.

---

[2] No evidence of error was adduced at trial concerning Def. Ex. H, as the District Court ruled that Ex. H was the best evidence of its contents.

Petitioner argues she received disparate pay treatment during the period of time she was a tester, since she had been relegated to "low-paying" all female positions. The evidence, however, which reveals that her initial application for employment indicated her desire to be an operator or a clerical employee (79 Def. Ex. P, p. 79 Tr. 440), and the evidence of the other positions she held since 1960 (79 Def. Ex. L), strongly suggest a contrary conclusion. Further, on one occasion, she had been promoted to a management position at a higher rate of pay (79 Def. Ex. L, 79 Tr. 441), and has been offered other management positions. (79 Tr. 442) She had not applied for a craft position as provided for in the Collective Bargaining Agreement until 1968, when she applied for the deskman position. She was promptly accepted for that position (79 Tr. 441, 442).

Under the reasoning of *United States* v. *St. Louis-San Francisco Railway Co.*, 464 F.2d 301 (8th Cir. 1972), and under 42 U.S.C.A. 2000(e)(2)(h), Respondent contends that its seniority system as applied to Petitioner is a *bonafide* seniority system. As the Court stated, there must be pertinent objective criteria for determining what applicants for promotion or transfer are qualified to fill particular vacancies. *Id.* at 309. Additionally, Respondent's Ex. F (a copy of the Consent Decree dated January 18, 1973, U.S. Dist. Ct. E.D. of Penn.) specifically provided that Respondent's seniority system was acceptable and was to be utilized for all purposes.[3] The Consent Decree was the product of litigation between the Federal Government and the Bell System and dealt with employment matters and rights of Bell System employees.

At the time of Petitioner's alleged complaints, the Collective Bargaining Agreement (Ex. H herein) specified that the only requisites for transfer and/or promotion were (1) an employee's

---

[3] Since the entry of the Decree, certain modifications occurred, but were not applicable to Petitioner.

desire for a particular job as indicated by a job bid or a letter of application; (2) if a craft job is involved, the employee must pass the craft test; (3) the employee's seniority—not sex—determined the award of the sought after position.

The Petitioner's argument that the rate of pay of any male employee of Southwestern Bell holding the job of deskman with the *same overall seniority* as the Petitioner was higher than Petitioner is totally unsupported by the evidence. The record clearly establishes that at the time of Petitioner's initial placement as a tester, the Petitioner received more pay ($114.00) than the other new testers in her group, and continued to do so while in that position. (Def. Exs. C, M, N & O)

For the foregoing reasons the lower courts' decisions should be affirmed.

B

The Court Of Appeals Did Not Commit Error Nor Did It Depart From The Accepted And Usual Course Of Judicial Proceedings When It Affirmed The Trial Court's Overruling Of Petitioner's Motion For The Exclusion Of Witnesses

The decision of the District Court to exclude witnesses from the courtroom in a civil proceeding is within the discretion of the trial court, and is not subject to review, except in cases of manifest abuse or prejudice. The request to exclude should be timely and in the absence of statute, it should be made at the commencement of the case and comes too late if made after testimony has been received. *U.S.* v. *Robinson,* 502 F.2d 894 (7th Cir. 1974); *Copeland* v. *U.S.,* 343 F.2d 287, 120 U.S. App. D.C. 5 (1964). *See also* 88 C.J.S., Trial §§65, 66 and 75 Am. Jur.2d., Trial §61.

In the instant case, the Petitioner's counsel did not request exclusion of Respondent's management employees until the morning of the second day of trial. (79 Tr. 133) No reasons were

given for the request which was subsequently denied by the District Court *until* the filing of Petitioner's brief in her appeal to the Eighth Circuit wherein the stated reason was "plaintiff's counsel was fearful of reprisals against non-management witnesses." (App. Brief, p. 33) However, neither the evidence at trial nor Petitioner's brief set forth any proof or facts underlying his alleged fears. Her Petition for Writ of Certiorari herein, likewise, fails to do so.

Rule 615, Exclusion of Witnesses, provides:

> "At the request of either party the court shall order witnesses excluded *so that they cannot hear the testimony of other witnesses*," (Emphasis Added.)

The purpose of the exclusion rule has been stated to be for the purpose of discouraging and exposing fabrication, inaccuracy and collusion; *Braswell* v. *Wainright*, 330 F.Supp. 281 (D.C. Fla. 1971) and the avoidance of shaping or matching of testimony, *U.S.* v. *Leggett*, 326 F.2d 613 (C.A.N.C. 1964), *cert. den.* 84 S.Ct. 1633, 377 U.S. 955, 12 L.Ed.2d 499. There has been no showing or allegation that other witnesses patterned their testimony after witness McAdams. Indeed, an examination of the record is clear that the remaining witnesses who testified did not fashion their testimony after witness McAdams, or any other witness.

Respondent submits that Petitioner's allegation of error must fail inasmuch as Rule 615 simply does not apply to the facts herein and because the district court did not abuse its discretion in rejecting the Petitioner's late request.

C.

The Lower Courts Correctly Ruled That The Respondent Had Not Discriminated Against The Petitioner In Violation Of Title VII Of The Civil Rights Act Of 1964 Under The Circumstances Surrounding Her Application For, Training In, And Demotion From, A Deskman's Position.

Petitioner argues that Respondent discriminatorily treated her in training for and demotion from the deskman position. At trial, however, Petitioner's allegations were unsupported by *any* independent, corroborative or probative evidence. In this respect, the District Court heard the witnesses, weighed the evidence, testimony and exhibits and then found adversely to the Petitioner. On appeal that decision was upheld. In this record, the lower courts decisions are entitled to great weight, and should not be reversed unless clearly erroneous, which Respondent submits they are not.

The Eighth Circuit held in *Tuft* v. *McDonnell Douglas,* 581 F.2d 1304 (8th Cir. 1978):

> "It is the plaintiff's burden, in a Title VII case, to establish a prima facie case of discrimination, before the burden of proof shifts to the defendant to show valid reasons for its actions. *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). 'The central focus of the inquiry in a case such as this is always whether the employer is treating 'some people less favorably than others because of their race, color, religion, sex or national origin.' " *Id.* at 1306, quoting from *Furnco Construction Corp.* v. *Waters,* 438 U.S. 565, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957.

Hence, to establish a prima facie case of sex discrimination, Petitioner's evidence must show *at the very minimum,* that in the application for, training in and demotion from the test deskman position, she was treated "less favorably" than similarly situated males in respect to those situations. *Middleton* v. *Remington Arms Company, Inc.,* 594 F.2d 1210, at 1213[2] (8th Cir. 1979)

Considering these in order, Petitioner's own testimony revealed that even though she says she was told to cut her hair before applying for a craft job, she was not required to cut it before becoming a deskman. (McGrath, 79 Tr. 43-44) She submitted

her letter of application for the deskman position to her *Union* and was subsequently informed by a *Union* representative that she should resubmit it in an expanded form *before the Union* would forward it to Respondent's management representatives. (79 Tr. 22 & 24) Mr. McGrath, her second line supervisor, had no objection to her first letter of application, stating it would have been accepted, had he received it. (Tr. 42-43, 67-68) He denied requiring her to cut her hair (Tr. 43-44, 77, 83-84). Arma Williams, another employee, stated that *her* hair had always been long, and she had not been required to cut it prior to being placed in a craft position. (79 Tr. 537)

Petitioner testified she had been aware of craft job openings because notices were posted on the employee bulletin board (79 Tr. 19); however, she "thought" that these craft jobs were restricted to men. (79 Tr. 19) Significantly, however, despite this alleged belief, *she did apply* to be a deskman. On cross-examination, she was not able to direct the District Court to *any* language in the Collective Bargaining Agreement (79 Tr. 445), restricting applications or openings to men, nor was she able to do so on appeal. No other evidence was adduced by Petitioner in support of her position on this aspect of her claim.

The Petitioner stated that when she applied for the job, she felt she would be discriminated against due to her sex (79 Tr. 468) and felt she was discriminated against when she was assigned as a deskman. (79 Tr. 465)

With respect to her training, the Petitioner's entire argument is that her on-the-job training was a "designed to fail conspiracy". The record is quite clear, however, that she received the same routine orientation, training and daily supervision as did the other testers, and she received the same specialized training from Mr. Wann as did the other testers, which training was over and above that which Mr. Schomogy was able to give. (79 Tr. 364) All of the other new testers, including Miss Williams, progressed. Petitioner did not.

Again, although the Petitioner alleges discriminatory treatment in her training, upon close examination of her testimony it is seen that she thought she apparently needed training and, indeed, had requested to be sent to a training school for basic electricity principles. She now concludes that Southwestern Bell's intent was to harass her and discriminate against her when she was sent to the training class which she had requested. (79 Tr. 467, 468) Further, the evidence is that she was trained by Respondent's personnel in the frame room for two days and in the central office for one day. She stated she thought the time spent was very interesting and helpful. (Def. Ex. D, p. 1)

Petitioner also contends she was discriminated against because she was not allowed to accompany a repair employee outside in order to observe his work. (79 Tr. 274) However, her second line supervisor, John McGrath, stated there was no company policy with respect to a tester accompanying a repair employee outside and no one did. (79 Tr. 81). Petitioner was treated exactly the same as were all other employees.

Arma Williams, a co-worker of the Petitioner and a new tester with her during the period in question testified that she and the Petitioner had received the same training as the new male testers (79 Tr. 530) and that she never observed any physical abuse of the Petitioner by Mr. Wann. (Tr. 532) In addition, Arma Williams, after a few months of training, had progressed to the point where she was assigned night work with minimal supervision and actually had to retest trouble reports which the Petitioner had done during the day (79 Tr. 532, 535)

The Petitioner's contentions that she was discriminated against when she was demoted from the position of deskman is *again* without merit.

An examination of the contents of the Petitioner's personnel file reflects that during her entire time in the deskman job, she experienced difficulties, was unable to grasp the technical aspects of testing and could not analyze the trouble presented.

Exhibits C, D and E reflect that the Petitioner was promptly advised of her difficulties when they occurred. Notwithstanding management's efforts to keep her aware of their appraisals of her, she admittedly gave no credence to her supervisors, since she felt she was performing in an excellent manner, even though she wasn't rated as such. (79 Tr. 459)

Respondent witness Schomogy, a first line supervisor under whom Petitioner worked, and who prepared many of Respondent's records concerning Petitioner, indicated that poor job performance as a deskman was brought to her attention on the following dates: February 10, 1969 - unsatisfactory progress in understanding and applying basic testing procedures and talking to analyze customer trouble reports, unnecessary and excessive notes on trouble tickets; August 12, 1969 - improper testing procedures; August 13, 1969 - unsatisfactory testing and progress; September 16, 1969 - inability to retain and apply instructions - incomplete records; September 26, 1969 - failure to complete a test procedure due to failure to follow instructions; September 30, 1969 - inability to analyze and test; October 3, 1969 - inability to apply proper technical procedures.

Witness Sefton, another supervisor of Petitioner, testified that although she could learn the technique from a book she could not apply it and she was very mechanical in her approach to problem solving (79 Tr. 282); she could not make a decision nor did she have the ability to follow a logical sequence of events and come to the proper conclusion. (79 Tr. 282) He stated that every supervisor that was his equal in other work groups with which the Petitioner had worked requested she be removed from the test desk because of the problems she created. (79 Tr. 284-285) He testified that he recommended she be removed from the test desk due to her lack of organization and analytical abilities. (79 Tr. 286)

Arma Williams, a nonmanagement employee, working as a dispatcher (a craft position) in the fall of 1969 (79 Tr. 533),

stated it was a part of her job to analyze the Petitioner's work in dispatching the necessary repair forces. (79 Tr. 534) She stated the Petitioner was a very critical person when it came to testing, but she didn't use common sense (79 Tr. 534), and as a result of the Petitioner's invalid test results, Ms. Williams was required to retest several customer trouble reports. (79 Tr. 535, 536) Ms. Williams stated that the Petitioner was not a satisfactory tester. (79 Tr. 536)

Respondent submits that the Petitioner has not sustained her burden of proof, inasmuch as her testimony and the evidence adduced by Respondent clearly show that she was unable to perform the duties of a deskman and the company has provided a more than adequate explanation for her demotion.

Appellant, citing *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374 (5th Cir. 1978), argues that since a finding of non-discrimination is a finding of ultimate fact, such a finding can be reversed on appeal, free of the "clearly erroneous" rule. The Eighth Circuit in *Shull* v. *Dain, Kalman & Quail, Inc.*, 561 F.2d 152, at 155[2], (8th Cir. 1977) held that:

> "It is not the function of an appellate court to try the case de novo, or to pass upon the credibility of witnesses or on the weight to be given to their testimony, and a factual finding is not clearly erroneous simply because a different result might have been reached had the case been tried originally to the appellate court."

The Eighth Circuit has held that the burden is on a discharged former employee claiming a violation of Title VII to affirmatively prove discrimination. *Naraine* v. *Western Electric Co.*, 507 F.2d 590 (8th Cir. 1974) A similar burden exists in the instant case and the Petitioner had the burden to establish a prima facie case of sexual discrimination, which she has failed to do. Hence, although Respondent went forward with evidence at trial, it never was compelled to establish the satisfactory explanation for her demotion as it did. *Naraine* v. *Western Electric, supra.* To

rebut the Petitioner's unfounded allegations and her conclusionary testimony, Respondent offered her performance appraisals and ratings; the testimony of long-term supervisors; and the testimony of co-workers.

In *DiSalvo,* the defendant Chamber of Commerce appealed from a trial court judgment holding it liable to plaintiff for sex discrimination. The District Court found that the Chamber of Commerce had, and was, paying its male employees substantially more than it was paying the plaintiff for substantially equal work, contrary to the facts herein. In affirming the lower court's decision, the Eighth Circuit stated:

> "[t]he findings of fact by the district court are entitled to great weight and we must accept them unless they are clearly erroneous under Federal Rules Civil Procedure 52(a)." *DiSalvo* v. *Chamber of Commerce,* etc. 568 F.2d 593 at 596 [2, 3], (8th Cir. 1978)

The Eighth Circuit took an identical approach in the case of *Lewis* v. *General Motors Corp.,* 557 F.2d 1255 (8th Cir. 1977), where the plaintiff had described several incidents which, in her opinion, demonstrated discriminatory treatment by her co-workers and by her foreman. In affirming the trial court's denial that the discharge was discriminatory, the court stated:

> "The District Court specifically rejected Lewis's testimony regarding the alleged incidents of sexual harassment and found that she had been criticized by her foreman on numerous occasions. The court credited Stephens' testimony that Lewis performed her work improperly and was terminated for that reason. Our review of the record convinces us that the District Court's credibility finding has support in the record and that its factual findings are not clearly erroneous."

Similarly, in the case at bar, the lower courts rejected the Petitioner's testimony regarding alleged incidents of sexual harass-

ment and discrimination and credited the testimony of witnesses Schomogy, Sefton, Stewart, Williams and others, that Petitioner performed her work improperly and was demoted for that reason. *See also Cedeck* v. *Hamiltonian Federal Savings & Loan Ass'n.*, 551 F.2d 1136 (8th Cir. 1977) and *Pack* v. *Energy Research and Development Administration*, 566 F.2d 1111 (8th Cir. 1977). Clearly, therefore, the Trial Court's factual findings in the instant case meet and surpass the "clearly erroneous" test and the Eighth Circuit's decision was proper.

The most recent case, *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. ____, 67 L.Ed.2d 207, 101 S.Ct. 1089 (1981) proscribes the obligation of an employer once a Title VII complainant produces a prima facie case and requires the employer to only articulate the non-discriminatory reasons for its action. The Respondent clearly did so herein.

As the District Court's findings of fact were based on the correct legal standard and as it applied the applicable legal standard of Title VII of the Civil Rights Act of 1964 in finding that the Petitioner was not treated "less favorably" than others because of her sex, the trial court's factual findings meet and surpass the "clearly erroneous" test and the Court of Appeals decision should be affirmed.

With respect to the Petitioner's allegations that Southwestern Bell harassed her and otherwise retaliated against her after her demotion to the job of repair clerk and her filing of a charge of discrimination under Title VII, the District Court held *inter alia* that:

> "21. Although the plaintiff has alleged further discrimination, harassment and reprisal by defendant since her demotion, no credible evidence of such discrimination, harassment and reprisal exists."

and that: